

DISSENTING VIEWS

H.J. Res. 36

We oppose H.J. Res. 36, which would -- for the first time in our Nation's history -- modify the Bill of Rights to limit freedom of expression. Although the motives of the proposition's supporters are well-intended, we believe that adopting H.J. Res. 36 is wrong as a matter of principle, wrong as a matter of precedent, and wrong as a matter of practice.

H.J. Res. 36 responds to a perceived problem -- flag burning -- that is all but nonexistent in American life today. Studies indicate that in all of American history from the adoption of the United States flag in 1777 through the *Texas v. Johnson*¹ decision in 1989 there were only 45 reported incidents of flag burning.² Moreover, most incidents of flag burning can be successfully prosecuted today under laws relating to breach of the peace -- *all* fully within current constitutional constraints.³

By embedding a principle prohibiting flag desecration into the Constitution, we will have elevated the flag over other cherished symbols, including not only national symbols such as the Declaration of Independence and Statue of Liberty, but religious symbols such as crosses and bibles.

Ironically, H.J. Res. 36 will not even achieve the sponsors' stated purpose -- protecting the American flag and honoring American's veterans. History has taught us that restrictive legislation merely encourages more flag burning in an effort to protest the law itself,⁴ and a vaguely worded constitutional

¹491 U.S. 397 (1989). In a 5-4 decision authored by Justice Brennan, the Court found that the Texas flag desecration law was unconstitutional as applied in that it was a "content-based" restriction. Subsequent to *Johnson*, Congress enacted the Flag Protection Act in an effort to craft a more content-neutral law. In *United States v. Eichman*, 496 U.S. 310 (1990), the Court overturned several flag burning convictions brought under the new law, finding that the federal law continued to be principally aimed at limiting symbolic speech.

²Robert J. Goldstein, *Two Centuries of Flagburning in the United States*, 163 Flag Bull. 65 (1995).

³See *Hearing on H.J. Res. 79, Proposing an Amendment to the Constitution of the United States Before the Subcomm. on Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (May 24, 1995) [hereinafter, *1995 House Judiciary Hearings*] (statement of Bruce Fein, at 1).

⁴In his extensive survey of the history of American flag desecration law, Robert Goldstein writes that "[a]lthough the purpose of the [Flag Protection Act adopted by Congress in 1968] was to supposedly end flag burnings, its immediate impact was to spur perhaps the largest single wave of such incidents in American history." Robert J. Goldstein, *Saving "Old Glory" -- The History of the American Flag*

amendment such as H.J. Res. 36 will surely cause such efforts to increase many times over. If we truly want to honor our veterans, it would be far more constructive for Congress to ensure that money is available under the budget to provide them promised health care benefits and pension payments. Thus, while we condemn those who would dishonor our nation's flag, we believe that rather than protecting the flag, H.J. Res. 36 will merely serve to dishonor the Constitution and compromise the very ideals our nation was founded on. Retired General Colin L. Powell echoed this sentiment, stating,

The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away.⁵

IMPORTANCE OF FREEDOM OF EXPRESSION

Freedom of expression is one of the preeminent human rights and is central to fostering all other forms of freedom. Professor Emerson notes that since as early as the Renaissance, free and open expression has been considered to be an essential element of human fulfillment: "The theory [of free expression] grew out of an age that was awakened and invigorated by the idea of a new society, in which man's mind was free, his fate determined by his own powers of reason, and his prospects of creating a rational and enlightened civilization virtually unlimited."⁶

Freedom of expression also provides an important safety valve for society. Professor Greenwalt writes that "those who are resentful because their interests are not accorded fair weight, and who may be doubly resentful because they have not even had a chance to present those interests, may seek to attain by radical changes in existing institutions what they have failed to get from the institutions themselves. Thus liberty of expression, though often productive of divisiveness, may contribute to social stability."⁷

Freedom of expression also serves as an important tool in checking the abuse of powers by public officials. Professor Blasi has noted that this "checking function" should be accorded a level of protection higher than that given any other type of communication because "the particular evil of official

Desecration Controversy 215 (1995).

⁵Letter from Colin L. Powell to Hon. Patrick Leahy, May 18, 1999.

⁶Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 886 (1963).

⁷Kent Greenwalt, *Speech and Crime*, A.B.F. Res.J. 645, 672-3 (1980). *See also* Rotunda, *Treatise on Constitutional Law: Substance and Procedure* § 20.6 at 18 (2d ed. 1992).

misconduct is of a special order.”⁸

Perhaps the most important function served by a system of free expression is that it allows for free and open exchange of thoughts -- referred to by Justice Holmes as the "marketplace of ideas."⁹ In a 1644 speech before the English Parliament criticizing censorship laws, Milton articulated the notion that free expression helps to prevent human error through ignorance:

[T]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple, whoever knew truth put to the worse in a free and open encounter?¹⁰

In his 1859 essay *On Liberty*, John Stuart Mill further expanded upon this vision when he recognized the public good and enlightenment which results from the free exchange of ideas:

First, if any opinion is compelled to silence, that opinion for aught we can certainly know, be true. . . . Secondly, though this silenced opinion be in error, it may, and very commonly does, contain a portion of the truth. . . . Thirdly, even if the received opinion be not only true but the whole truth; unless it is suffered to be and actually is, vigorously and earnestly contested, it will by most of those who receive it, be held in the manner of a prejudice.¹¹

The American system of government is itself premised on freedom of expression. Professor Emerson notes, "Once one accepts the premise of the Declaration of Independence that governments derive 'their just powers from the consent of the governed' -- it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgments."¹²

⁸See Redish, *The Value of Free Speech*, 130 U. Penn. L. Rev. 591, 611 (1982).

⁹Justice Holmes articulated his "marketplace of ideas" theory of free speech in his dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919): "[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get it accepted in the competition in the market."

¹⁰J. Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644).

¹¹J.S. Mill, *On Liberty* Ch. II. (1859).

¹²Emerson, *supra* note 6, at 883.

The founding fathers recognized the difficulties in maintaining a system of free expression against the "tyranny of the majority." In *The Federalist Papers*, James Madison expressed concern as to the unfettered power of the majority: "By a faction I understand a number of citizens, whether amounting to a majority or a minority of the whole who are . . . adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."¹³ It is for these reasons that the Constitution not only explicitly protected freedom of expression,¹⁴ but created a judiciary possessing the power of review over all legislative and executive action. These twin safeguards -- a written constitution and an independent judiciary -- have served to foster in this country the freest society in human history.

H.J. RES. 36 IS WRONG AS A MATTER OF PRINCIPLE

Unfortunately, H.J. Res. 36 belies our system of unfettered political expression. In so doing, it not only undermines our commitment to freedom of expression and opens the door to selective prosecution based on political belief, but diminishes our nation's international standing.

The true test of any nation's commitment to freedom of expression lies in its ability to protect unpopular expression, such as flag desecration. In 1929, Justice Holmes wrote that it was the most imperative principle of our Constitution that it protect not just freedom for the thought and expression we agree with, but "freedom for the thought we hate."¹⁵ As Justice Jackson so eloquently wrote in 1943:

Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.¹⁶

As Jim Warner, a Vietnam veteran and prisoner of the North Vietnamese from October 1967 to March 1973, has written:

¹³The Federalist No. 10 (J. Madison) at 57 (J. Cooke ed. 1961).

¹⁴Indeed, the framers chose to include freedom of speech in the First Amendment of the Bill of Rights, and wrote its protection in absolute terms: "Congress shall make no law . . . abridging freedom of speech. . . ." The strictness of the language is in contrast with the Fourth Amendment, for example, which prohibits only "unreasonable searches and seizures."

¹⁵*United States v. Schwimmer*, 254 U.S. 644, 655 (1929) (Holmes, J., dissenting).

¹⁶*West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

The fact is, the principles for which we fought, for which our comrades died, are advancing everywhere upon the Earth, while the principles against which we fought are everywhere discredited and rejected. The flag burners have lost, and their defeat is the most fitting and thorough rebuke of their principles which the human could devise. Why do we need to do more? An act intended merely as an insult is not worthy of our fallen comrades. It is the sort of thing our enemies did to us, but we are not them, and we must conform to a different standard. . . . Now, when the justice of our principles is everywhere vindicated, the cause of human liberty demands that this amendment be rejected. Rejecting this amendment would not mean that we agree with those who burned our flag, or even that they have been forgiven. It would, instead, tell the world that freedom of expression means freedom, even for those expressions we find repugnant.¹⁷

And there can be no doubt that "symbolic speech" relating to the flag falls squarely within the ambit of traditionally protected speech. Our nation was borne in the dramatic symbolic speech of the Boston Tea Party, and our courts have long recognized that expressive speech associated with the flag is protected speech under the First Amendment.

Beginning in 1931 with *Stromberg v. California*¹⁸ and continuing through the mid-1970s with *Smith v. Goguen*¹⁹ and *Spence v. Washington*,²⁰ the Supreme Court has consistently recognized that flag-related expression is entitled to constitutional protection. Indeed, by the time Gregory Johnson was prosecuted for burning a U.S. flag outside of the Republican Convention in Dallas, the State of

¹⁷See *Hearing on H.J. Res. 54, Proposing an Amendment to the Constitution of the United States Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2nd Sess. (April 30, 1997) [hereinafter *1997 House Judiciary Hearings*] (statement of Jim Warner). These thoughts are echoed by Terry Anderson, a former U.S. Marine Staff Sergeant and Vietnam veteran who was held hostage in Lebanon, who wrote that "[H.J. Res. 54] is an extremely unwise restriction of every American's Constitutional rights. The Supreme Court has repeatedly held that the First Amendment protects symbolic acts under its guarantee of free speech. Burning or otherwise damaging a flag is offensive to many (including me), but it harms no one and is so obviously an act of political speech that I'm amazed anyone could disagree with the Court." (*Id.* statement of Terry Anderson).

¹⁸283 U.S. 359 (1931) (state statute prohibiting the display of a "red flag" overturned). Absent this decision, a State could theoretically have *prevented* its citizens from displaying the U.S. flag.

¹⁹415 U.S. 94 (1972).

²⁰418 U.S. 405 (1974) (overturning convictions involving wearing a flag patch and attaching a peace sign to a flag).

Texas readily acknowledged that Johnson's conduct constituted "symbolic speech" subject to protection under the First Amendment.²¹ Those who seek to justify H.J. Res. 36 on the grounds that flag desecration does not constitute "speech" are therefore denying decades of well understood court decisions.²²

While we deplore the burning of an American flag in hatred, we recognize that it is our allowance of this conduct that reinforces the strength of the Constitution. As one federal court wrote in a 1974 flag burning case, "[T]he flag and that which it symbolizes is dear to us, but not so cherished as those high moral, legal, and ethical precepts which our Constitution teaches."²³ The genius of the Constitution lies in its indifference to a particular individual's cause. The fact that flag burners are able to take refuge in the First Amendment means that every citizen can be assured that the Bill of Rights will be available to protect his or her rights and liberties should the need arise.

H.J. Res. 36 will also open the door to selective prosecution based purely on political beliefs. When Peter Zenger was charged with "seditious libel" in the very first case involving freedom of speech on American soil, his lawyer, James Alexander warned:

The abuses of freedom of speech are the excrescences of Liberty. They ought to be suppressed; but whom dare we commit the care of doing it? An evil Magistrate, entrusted with power to punish Words, is armed with a Weapon the most destructive and terrible. Under the pretense of pruning the exuberant branches, he frequently destroys the tree.²⁴

The history of the prosecution of flag desecration in this country bears out these very warnings.

²¹*Texas v. Johnson*, 491 U.S. at 397.

²²See also, Note, *The Supreme Court -- Leading Cases*, 103 Harv. L. Rev. 137, 152 (1989) ("the majority opinion [in *Johnson*] is a relatively straightforward application of traditional first amendment jurisprudence"); Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 Ind. L.J. 511, 547 (1991) ("*Johnson* is an easy case if well-established first amendment principles are applied to it"). Survey results show that the majority of Americans who initially indicate support for a flag protection amendment oppose it once they understand its impact on the Bill of Rights. In a 1995 Peter Hart poll, 64 percent of registered voters surveyed said they were in favor of such an amendment, but when asked if they would oppose or favor such an amendment if they knew it would be the first in our Nation's history to restrict freedom of speech and freedom of political protest, support plummeted from 64 percent to 38 percent.

²³*U.S. ex rel Radich v. Criminal Court of N.Y.*, 385 F. Supp. 165, 184 (1974).

²⁴Philadelphia Gazette, Nov. 17, 1737, quoted in Levy, *Legacy of Suppression* 135 (1960).

The overwhelming majority of flag desecration cases have been brought against political dissenters, while commercial and other forms of flag desecration have been almost completely ignored. An article in *Art in America* points out that during the Vietnam War period, those arrested for flag desecration were "invariably critics of national policy, while 'patriots' who tamper with the flag are overlooked."²⁵ Whitney Smith, director of the Flag Research Center has further observed that commercial misuse of the flag was "more extensive than its misuse by leftists or students, but this is overlooked because the business interests are part of the establishment."²⁶

Supporters of H.J. Res. 36 argue that many flag desecration "incidents" involve the burning of the flag. Yet the burning of the flag is also considered to be the proper way to retire a flag, and such flag burning events are common throughout the country.²⁷ H.J. Res. 36 seeks to alter the present First Amendment implications of flag burning. It is clear under H.J. Res. 36 that burning a flag while saying something respectful would not be inconsistent with the proposed Amendment, while burning a flag while saying something which offended the local sheriff could be a criminal offense. Thus, what would be regulated by H.J. Res. 36 is not the physical action of burning a flag, but the sentiments expressed with the burning.

Almost as significant as the damage H.J. Res. 36 would do to our own Constitution, is the harm it will inflict on our international standing in the area of human rights. Demonstrators who cut the communist symbols from the center of the East German and Romanian flags prior to the fall of the Iron Curtain committed crimes against their country's laws, yet freedom-loving Americans justifiably

²⁵See Robert J. Goldstein, *supra* note 4, at 154.

²⁶*Id.*

²⁷A June 19, 2001 search of recent news articles conducted by the Congressional Research Service revealed four articles, all of which referred to flag burning by the American Legion. See "Wayne Briefly," *The Detroit News*, June 10, 2001, at 3 (the town of Dearborn, Michigan would burn tattered American flags during its annual Flag Day ceremony from 6:00 to 7:00 p.m. on June 14, 2001); Sonia Csencsits, "Ex-POW Tells What To Do Before Disrespecting Flag ** Ask Someone To Whom It's Meaningful, He Urges at Disposal Event," *The Morning Call*, June 10, 2001, at B3 (The town of Bethlehem, PA disposed of more than 7,000 flags by burning them. "Orange flames engulfed the flags as veterans and members of Boy Scout Troop 352, Bethlehem, solemnly dropped flags of all sizes into a 55-gallon drum. Often flames leaped more than 4 feet in the air as others from the audience chose flags from among those piled high on two picnic tables, ready for disposal."); LaTanya Letcher & Sue Ter Maat, "War Dog Memorial To Be Unveiled in Streamwood," *Chicago Daily Herald*, May 24, 2001, at C1 (the annual Memorial Day walk in Bartlett, Illinois would include a flag retirement ceremony where 13 flags would be burned); Melissa Eiselein, "Legion Shares Etiquette, Symbolism of Old Glory," *The Press-Enterprise*, June 14, 2001, at B02 (flags would be destroyed in a ceremony on July 3). No incidents of flag burning aside from these American Legion events were found.

applauded these brave actions. If we are to maintain our moral stature in matters of human rights, it is essential that we remain fully open to unpopular dissent, regardless of the form it takes.²⁸

To illustrate, when the former Soviet Union adopted legislation in 1989 making it a criminal offense to "discredit" a public official, Communist officials sought to defend the legislation by relying on, among other things, the United States Flag desecration statute.²⁹ By adopting H.J. Res 36 we will be unwittingly encouraging other countries to enact and enforce other more restrictive limitations on speech while impairing our own standing to protest such actions.

H.J. RES. 36 IS WRONG AS A MATTER OF PRECEDENT

Adoption of H.J. Res. 36 will also create a number of dangerous precedents in our legal system. The Resolution will encourage further departures from the First Amendment and diminish respect for our Constitution.

If we approve H.J. Res. 36, it is unlikely to be the last time Congress acts to restrict our First Amendment liberties. As President Reagan's Solicitor General Charles Fried testified in 1990:

Principles are not things you can safely violate "just this once." Can we not just this once do an injustice, just this once betray the spirit of liberty, just this once break faith with the traditions of free expression that have been the glory of this nation? Not safely; not without endangering our immortal soul as a nation. The man who says you can make an exception to a principle, does not know what a principle is; just as the man who says that only this once let's make $2+2=5$ does not know what it is to count.³⁰

Adoption of H.J. Res. 36 will also diminish and trivialize our Constitution.³¹ If we begin to

²⁸See, e.g., *1997 House Judiciary Hearings*, *supra* note 5 (statement of PEN American Center, Feb. 5, 1997) ("To allow for the prosecution of [flag burners] would be to dilute what has hitherto been prized by Americans everywhere as a cornerstone of our democracy. The right to free speech enjoys more protection in our country than perhaps any other country in the world.").

²⁹Rotunda, *supra* note 7, §20.49 at 352.

³⁰*Measures to Protect the American Flag, Hearing Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (June 21, 1990) (statement of Charles Fried at 113) [hereinafter *1990 Senate Judiciary Hearings*].

³¹Inserting the term "desecration" into the Constitution would in and of itself seem highly inappropriate. Webster's New World Dictionary defines "desecrate" as "to violate the sacredness of,"

second guess the courts' authority concerning matters of free speech, we will not only be carving an awkward exception into a document designed to last for the ages, but will be undermining the very structure created under the Constitution to protect our rights. This is why Madison warned against using the amendment process to correct every perceived constitutional defect, particularly concerning issues which inflame public passion.³² Conservative legal scholar Bruce Fein emphasized this concern when he testified before the Subcommittee at 1995 House Judiciary hearings:

While I believe the *Johnson* and *Eichman* decisions were misguided, I do not believe a Constitutional amendment would be a proper response. . . . To enshrine authority to punish flag desecrations in the Constitution would not only tend to trivialize the Nation's Charter, but encourage such juvenile temper tantrums in the hopes of receiving free speech martyrdom by an easily beguiled media. . . . It will lose that reverence and accessibility to the ordinary citizen if it becomes cluttered with amendments overturning every wrong-headed Supreme Court decision.³³

And, as Professor Norman Dorsen points out in his testimony, "not including the Bill of Rights, which was ratified in 1791 as part of the original pact leading to the Constitution, only 17 amendments have been added to it, and very few of these reversed constitutional decisions of the Supreme Court. To depart from this tradition now . . . would be an extraordinary act that could lead to unpredictable mischief in coming years."³⁴

H.J. RES. 36 IS WRONG AS A MATTER OF PRACTICE

and in turn defines "sacred" as "consecrated to a god or God; holy; or having to do with religion." The introduction of these terms could create a significant tension within our constitutional structure, in particular with the religion clause of the First Amendment.

³²Legal philosopher Lon Fuller also highlighted this very problem over four decades ago: "We should resist the temptation to clutter up [the Constitution with amendments relating to substantive matters. In that way we avoid] . . . the obvious unwisdom of trying to solve tomorrow's problems today. But [we also escape the] more insidious danger of the weakening effect [such amendments] have on the moral force of the Constitution itself." L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J.L. Ed. 457, 465 (1954), as cited in *Hearings on Proposed Flag Desecration Amendment before the Subcomm. on Constitution of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (June 6, 1995) [hereinafter, *1995 Senate Judiciary Hearings*] (statement of Gene R. Nichol).

³³*1995 House Judiciary Hearings*, *supra* note 3 (statement of Bruce Fein at 1-2).

³⁴*See 1997 House Judiciary Hearings*, *supra* note 5 (statement of Professor Norman Dorsen, New York University School of Law).

As a practical matter, H.J. Res. 36 is so poorly drafted and conceived that there can be no doubt it will open up a "Pandora's Box" of litigation. Not only are its terms incredibly open-ended and vague, but the Resolution gives us no guidance as to its intended Constitutional scope or parameter. While the amendment's supporters claim they are merely drawing a line between legal and illegal behavior, in actuality, they are drawing no line at all, but merely granting the federal government open-ended authority to prosecute dissenters who use the flag in a manner deemed inappropriate.

There is little understanding or consensus concerning the meaning of such crucial terms as "desecration" and "flag of the United States." Depending on the statute ultimately adopted under the Amendment's authority, "desecration" could apply to canceling flag postage stamps or use of the flag by Olympic athletes. The term "flag of the United States" could include underwear from the "Tommy Hilfiger" collection as well as a Puerto Rican flag including a likeness of the U.S. flag.³⁵

The Resolution's sponsors also appear to have little understanding as to its Constitutional scope or breadth. H.J. Res. 36 gives us no guidance whatsoever as to what if any provisions of the First Amendment, the Bill of Rights, or the Constitution in general that it is designed to overrule.³⁶ During debate of the 1995 proposed amendment, amendment sponsor Charles Canady (R-FL) asserted that the flag desecration amendment would simply restore the status quo before the Supreme Court ruled in 1989.³⁷ He later insisted, however, that the amendment would also allow the states to criminalize

³⁵1995 *House Judiciary Hearings*, *supra* note 3 (statement of Representative Serrano). *See also*, Rotunda, *supra* note 7, §20.49 at §90 (If we adopt laws outlawing flag desecration "there will be future problems defining what is a flag. Will it be a crime for someone to burn a flag? Or burning fireworks in the shape of an American flag? May a movie director (filming Francis Scott Key watching Fort McHenry) order that the American flag of 1812 be shot at and otherwise defaced? Will it be a crime for the post office to cancel (i.e. deface) a stamp that has on it a copy of the American flag? If a flag design is on a birthday cake, will it be a federal crime to light the birthday candles on the cake? Will cutting the cake deface it? Is it defacing the flag to display it upside down?").

³⁶Since H.J. Res. 36 is drafted to modify the entire Constitution, rather than any portion of the First Amendment, it is unclear whether and to what extent it will supersede provisions in the Bill of Rights relating to "void for vagueness" (First and Fifth Amendments), overbreadth and least restrictive alternatives test (First Amendment), search and seizure (Fourth Amendment), due process and self-incrimination (Fifth Amendment), cruel and unusual punishment (Eighth Amendment) and provisions in the Constitution relating to the supremacy clause (Article VI, Section 2) and the speech and debate clause (Article 1, Section 6). *See e.g.*, 1990 *Senate Judiciary Hearings*, *supra* note 29 (statement of Walter Dellinger); William Van Alstyne, *Stars and Stripes and Silliness Forever*, *Legal Times*, at 34 (October 2, 1989).

³⁷*House Comm. on the Judiciary, Markup Session of H.J. Res. 79*, 104th Cong., 1st Sess. 109 (1995).

wearing clothing with the flag on it.³⁸ The latter interpretation goes well beyond overturning *Johnson* and indicates that the flag desecration amendment could permit prosecution under statutes that were otherwise unconstitutionally void for vagueness. For example, the Supreme Court in 1974 declared unconstitutionally vague a statute that criminalized treating the flag contemptuously and did not uphold the conviction of an individual wearing a flag patch on his pants.³⁹ Rep. Canady's interpretation of the flag desecration amendment would allow such a prosecution despite the statute's vagueness.

It is insufficient to respond to these concerns by asserting that the courts can easily work out the meaning of the terms in the same way that they have given meaning to other terms in the Bill of Rights such as "due process." Unlike the other provisions of the Bill of Rights, H.J. Res. 36 represents an open-ended and uncharted invasion of our rights and liberties, rather than a back-up mechanism to prevent the government from usurping our rights.

CONCLUSION

Adoption of H.J. Res. 36 will undermine our commitment to freedom of expression and do real damage to the constitutional system set up by our forefathers. If we amend the Constitution to outlaw flag desecration, we will be joining ranks with countries such as China and Iran and the regimes of the former Soviet Union and South Africa.⁴⁰

We believe we have come too far as a nation to risk jeopardizing our commitment to freedom in such a fruitless endeavor to legislate patriotism. As the Court wrote in *West Virginia State Board of Education v. Barnette*:

[The] ultimate futility of . . . attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means of Russian unity, down to the last failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.⁴¹

If we adopt H.J. Res. 36, we will be denigrating the vision of Madison and Jefferson, and

³⁸*Id.* at 110.

³⁹*Smith v. Goguen*, 415 U.S. 566, 568-69 (1974).

⁴⁰Roman Rolinick, "Flag Amendment would put U.S. with Iran, China," UPI (July 1, 1989).

⁴¹319 U.S. at 641.

glorifying the simple-mindedness of Johnson and Eichman. If we tamper with our Constitution, we will have turned the flag, an emblem of unity and freedom, into a symbol of intolerance. We will not go on record as supporting a proposal which will do what no foreign power has been able to do -- limit the freedom of expression of the American people.

John Conyers, Jr.
Barney Frank
Howard Berman
Jerrold Nadler
Robert C. Scott
Melvin L. Watt
Zoe Lofgren
Sheila Jackson Lee
Maxine Waters
Tammy Baldwin